IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

Bhagwati Metals Vs. Union of India & ors.

D.B. CIVIL WRIT PETITION NO.4292/1994 UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA FOR QUASHING THE ORDER DATED 4.5.1994 OF CEGAT UNDER CENTRAL EXCISE ACT, 1944.

Date of Judgment :: January 23, 2007

REPORTABLE

PRESENT
HON'BLE MRS.JUSTICE GYAN SUDHA MISRA
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. N.K.Maloo, for the petitioner.
Mr.KK Sharma with Mr.Ajay Shukla, for the respondents.

BY THE COURT: (PER HON'BLE KOTHARI,J)

1. This writ petition is directed against the order of Central Excise & Gold (Control) Appellate Tribunal (CEGAT) dated 4.5.1994 upholding the levy of differential duty and penalty for the alleged clandestine removal of certain goods from the manufacturing unit of the petitioner-assessee.

2. At the out-set we may state that normally a reference or an appeal under the provisions of the Central Excise Act, 1944 (hereinafter referred to as the “Act”) would have lied to High court under Sec.35G/35H of

the Act but since this writ petition under Art. 226 and 227 of the Constitution of India was entertained way back in the year 1994 and has since remained pending here for all these 12 years, we are not inclined to dismiss this writ petition on the ground of such alternative remedy available to the petitioner particularly when this writ petition was admitted after hearing both the parties on 16.5.2002. Therefore, we heard the writ petition at length on merits.

3. Mr.N.K.Maloo, learned counsel appearing for the petitioner submitted that while upholding the order of the Adjudicating Authority, the Tribunal, dismissing the appeal of the assessee on 4.5.94 was not having the benefit of an order dated 28.6.1995 passed by the learned court of Special Judicial Magistrate, Economic Offences (Revenue), Jaipur wherein on a criminal complaint filed by the Superintendent, Central Excise Department, against the partners of the assessee firm M/s. Bhagwati Metals on the same set of facts and evidence as was available before the Adjudicating Authority and the CEGAT held on merits that no case of clandestine removal of goods was made out against the assessee firm and, therefore, the partners of the assessee firm Sh.Suresh Kumar Bajaj and Sh.Ashok Kumar Bajaj were not liable to be prosecuted and thus the court acquitted them of the charges leveled by the Excise Authorities.

4. Mr.N.K.Maloo, learned counsel appearing for the petitioner firm, therefore, strenuously urged before us that in view of this subsequent development where the findings of the Adjudicating Authority have not been upheld and not approved by a court of law of competent jurisdiction and rather conflicting findings have been given as to there being no clandestine removal of goods, the case deserves to be remanded back to the CEGAT for fresh consideration in view of this development and the said judgment of the competent court filed along with the application under O.41 R.27 CPC may be taken into account and the case be remanded back to the CEGAT. This prayer of the learned counsel for the petitioner was opposed by Mr.Kamlakar Sharma, appearing on behalf of the respondent-revenue.

5. The facts in the nut shell resulting in the demand and duty and penalty under the Act are like this:

6. That on 20.4.1988, four coils of bare copper wires weighing 101.200 kgs was checked by the authorities of the respondent department on the way side and the driver of the auto rikshaw, Shyam Lal was examined who produced a slip of paper of M/s.Krishna Cable Co. with hand written instructions thereon to bring those coils from one Mr.Kapil Gupta, Manager in the petitioner firm M/s.

Bhagwati Metals. On the apprehension of evasion of Excise Duty, the concerned authorities also visited the business place of the petitioner firm M/s. Bhagwati Metals and verified the stocks and examined Mr.Kapil Gupta, Manager. During the said survey, they also found 12 “Kacha” slips and on the basis of confessional statement of Kapil Gupta dated 22.4.88, Annex.4, additional duty was demanded on the basis of writings on the said kacha slips as well. In the third instance, the Excise Authorities also found that entries relating to manufacture of copper wire to the extent of 221.90 kgs was not made in RG-1 Register and thus for these three alleged acts according to adjudicating authorities the additional excise duty was leviable from the assessee along with penalty and redemption fine of Rs.20,000/- was imposed on the assessee. Penalty under Rule 9(1), 47, 173G was also imposed by order dated 8.12.1989. The assessee took the matter further before the CEGAT where it lost and thereafter the present writ petition was filed as stated above.

7. Learned counsel for the petitioner, Mr. Maloo, relying on Sec.14 of the Act which gives power to summon persons to give evidence and produce documents in inquiries under this Act to the Central Excise Authorities, urged that in the present case, the Adjudicating Authority never bothered to even allow

opportunity of cross-examination of Mr.Kapil Gupta, Manager of the assessee firm on the alleged confessional statement of whom the demand in question was raised by the Adjudicating Authority though such confessional statement stood retracted and withdrawn by the said Manager Mr.Kapil Gupta on the earliest available opportunity on 22.4.1988 vide Annex.4. The Adjudicating Authority according to him also failed to exercise his powers under Sec.14 of the Act to summon witnesses or alleged purchasers to whom the goods in question were alleged to have been sold by the assessee firm on the basis of 12 kacha slips and thus in the absence of any such witnesses, the assessee could not be said to have removed the goods and sold them in a clandestine manner to such purchasers. Therefore, the demand in question was illegal and unsustainable.

8. Per contra, Mr.Kamlakar Sharma appearing for Revenue urged that findings of facts given by the authorities do not call for any interference as they are based on evidence on record and subsequent judgment by the criminal court cannot be taken into consideration to upset those findings.

9. The short question which arises for our consideration is whether the findings of criminal court resulting in acquittal of the assessee in the prosecution

lodged by the departmental authorities on the same set of facts and evidence is a relevant consideration while deciding upon the validity of the orders passed by the Assessing Authorities under the quasi judicial assessment powers conferred upon them under the Act for determination of Excuse Duty.

10. In a recent judgment, the Hon'ble Supreme Court in **Narinder Mohan Arya Vs. United India Insurance Co. Ltd. and ors.** reported in (2006)4 SCC 713 dealt with a similar situation. An employee of Insurance Company was charge-sheeted for antedating the insurance cover note issued by him, found him guilty in enquiry and removed him from service. The appeal against the removal of order was also dismissed. The insured under such cover note filed a civil suit for the insured sum for the loss of insured goods. The insurance Company contested the suit, inter alia, on the basis of the report of the inquiry Officer. The Civil Court, however, held that the cover note was not antedated and accordingly the suit was decreed and such decree became final and acted upon by the Insurance Company. At this stage, the employee filed a memorial against Appellate Authority's order and claimed reinstatement in service. The Hon'ble Supreme Court held that the authority while disposing of such memorial was bound to consider the said later judgment of civil court as well as contentions raised by the employee and,

therefore, the appeal of the employee was allowed and he was directed to be reinstated in service.

11. The Hon'ble Supreme Court in para 40 and 41 of the Judgment put the note of caution in the following words:

> "40. We may notice that in Capt. M.Paul Anthony Vs. Bharat Gold Mines Ltd. this Court observed : (1999) 3 SCC 679 at p.695, para 35)
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> > "35. Since the facts and the evidence in both the proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case."
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> 41. We may not be understood to have laid down a law that in all such circumstances the decision of the **civil court or the criminal court** would be binding on the disciplinary authorities as this court in a large number of

> decisions points out that the same would depend upon other factors as well. See e.g. *Krishnakali Tea Estate V. Akhil Bharatiya Chah Mazdoor Sangh* [(2004) 8 SCC 200] and *Manager, Reserve Bank of India V. S.Mani* [(2005 5 SCC 100]. Each case is, therefore, required to be considered on its own facts."

The Hon'ble Supreme Court then held in para 42 and 45 as under:

> "42. It is equally well settled that the power of judicial review would not be refused to be exercised by the High Court, although despite it it would be lawful to do so. In Manager, Reserve Bank of India this Court observed:
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> > "39. The findings of the learned Tribunal, as noticed hereinbefore, are wholly perverse. It apparently posed unto itself wrong questions. It placed onus of proof wrongly upon the appellant. Its decision is based upon irrelevant factors not germane for the purpose of arriving at a correct finding of fact. It has also failed to take into consideration the relevant factors. A case for judicial review, thus was made out."

> 45..... “The conscience of the court may not have much role to play. It is unfortunate that the learned Single Judge did not at all deliberate on the contentions raised by the appellant. Discussion on the materials available on record for the purpose of applying the legal principles was imperative. The Division Bench of the High Court also committed the same error.”

12. In **M.K.S.Abubacker Vs. Secretary to Government of India, Ministry of Finance, New Delhi** and other reported in 1987 (32) E.L.T.640 (Mad.), the Madras High Court held that a quasi judicial Tribunal cannot ignore the findings and orders of the competent criminal courts in respect of an offence when the Tribunal proceeds to take any action on the basis of commission of that offence. In the case before the Madras High Court before the proceedings of the Departmental Authorities got terminated finally, the criminal court judgment was rendered by the Sessions Judge, Madras acquitting the petitioner not on any technical ground but on the merits of the case and the court, therefore, held that it would be a strange predicament when in respect of the same offence he would be punished by one Tribunal on the footing that he was guilty of the offence and he should be honorably acquitted by another Tribunal of the very same offence. The Court further observed that since the criminal courts

of the land are primarily entrusted with the enquiry into the offence, it is desirable that the findings and orders of the criminal courts should be treated as conclusive before quasi judicial Tribunals.

13. In **Capt. M.Paul Anthony Vs. Bharat Gold Mines Ltd. and another** (supra) reported in (1999)3 SCC 679 also the Hon'ble Supreme Court held that though departmental inquiry and criminal proceedings can simultaneously continue as these two were different proceedings and could be continued independently but since in the case in hand, ***both the proceedings were based on the same set of facts which were sought to be proved by the same witnesses*** and the competent court had already acquitted the appellant by rejecting the prosecution story, the findings against the appellant in an ex parte disciplinary inquiry could not be sustained.

14. One need not multiply the authorities on this point and the position of law seems to be clear that while proceedings by Adjudicating Authorities in quasi judicial assessment powers conferred under the Act are independent and can be carried on simultaneously but at the same time the parallel proceedings or even subsequent proceedings initiated and drawn in courts of law of competent jurisdiction, be it a criminal court or a civil court, is based on the same set of facts and evidences, the

findings of the court of law of competent jurisdiction cannot be said to be irrelevant altogether and cannot be brushed aside or ignored by the Adjudicating Authorities.

15. The question further remains as to what should be the course of action when the proceedings before the Adjudicating Authorities have terminated finally and contrary findings come from the courts of law, criminal or civil, at a later point of time?

16. In our considered opinion, in such circumstances, the matter deserves to be remanded back to the Tribunal who decided first in point of time to reconsider the matter afresh in the light of subsequent findings by the courts of law of competent jurisdiction on the same set of facts & evidence so that not only the petitioner assessee is not made to suffer or face two contrary findings by two different Tribunals or Courts of law which per se militates against the rule of law, fair play and sense of justice but the authority or Tribunal deciding the case in hand at prior point of time is given an opportunity to reconsider the case and decide the case afresh in the light of subsequent development in the form of findings by courts of law of competent jurisdiction on the same set of facts & evidence. This may not be however true, when findings or acquittal, subsequently by court of law is based on different evidence or on some other

technical grounds etc. and not on merits of the case considering the same set of facts and evidence as was available before the Adjudicating or Assessing Authorities.

17. Apparently, in the present case there is a conflict between the two judgments, one by the Tribunal on the adjudication side and on the other hand by the competent criminal court acquitting the partners of the assessee firm returning a finding on merit that there was no clandestine removal of goods and nothing of this sort was proved by the excise authorities. There is no dispute from either side that the set of facts and evidence available before two Tribunals or courts is the same.

18. Though considerations in the prosecution case in a criminal court are different as to appreciation of evidence or weighing of those facts and evidence and it is the proof beyond reasonable doubt which is the colour of the brush in a criminal court while preponderance of probabilities is the consideration in civil proceedings. In revenue and tax matters, the burden of proof admittedly lies upon the Revenue Authorities to prove taxable event & exigibility of tax or duty.

19. It would thus depend upon the findings of the courts

of competent jurisdiction as to how they have appreciated the same very evidence on record. In the present case, we find that the learned court in prosecution case clearly found that PW-2 Bhanwar Singh as well as DW-3 S.L.Bansal, the departmental authorities clearly admitted that there is no name of the assessee firm M/s. Bhagwati Metals on the “kacha slips” nor the driver of the auto rickshaw was taken to the Factory premises for identifying the goods. The learned Court also found that Mr.Kapil Gupta was never cross-examined nor the statements of Shyam Lal, Driver, Girdhari lal, Hanuman Das, Kapil and Ashok Bajaj were proved in evidence before the court. If the prosecution by the Central Excise Authorities on the same set of evidence was conducted in such a slip shod manner and the departmental authorities could not secure conviction on the said evidence, it is highly doubtful whether the same evidence could result in demand of Excise Duty and penalty from the assessee because indisputably the burden of proof even in taxing statute lies upon the revenue authorities to establish not only the clandestine removal of goods for imposition of excise duty but also guilty animus on the part of the assessee, before before penalty could be imposed on the assessee. We do not find any such exercise done at the end of the Adjudicating Authorities or the Central Excise Tribunal, therefore, the findings of the Tribunal in the adjudication side seem to stare in the face, particularly

in the light of findings returned by a court of law of competent jurisdiction. For these reasons, we consider it appropriate to remand the case back to the Tribunal for fresh consideration.

20. Therefore, without expressing any opinion on the merit of the case, we deem it proper to remand the case back to the CEGAT setting aside its order dated 4.5.94 to reconsider the appeal of the assessee in the light of order of acquittal on merit by the learned Special Judicial Magistrate, Economic Offences (Revenue), Jaipur rejecting the prosecution version in prosecution case no.355/90 on the same set of facts and evidence before it as were available before the adjudicating authority.

21. Consequently, this writ petition is disposed of and the case is remanded back to the Central Excise & Gold (Control) Appellate Tribunal for re-consideration of appeal of the assessee petitioner afresh in the light of subsequent developments.

(Dr.VINEET KOTHARI),J. **(Mrs.GYAN SUDHA MISRA),J.**

VS/